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In the Supreme Court of the United States

OCTOBER TERM, 1957

NO. 672

HAROLD BRANNON MAGNESS, *Petitioner*

Versus

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

Petitioner for writ of certiorari to the United States Court of Appeals for the Fifth District

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

NO. 16,430

HAROLD BRANNON MAGNESS, PETITIONER

VERSUS

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner, Harold Brannon Magness, by and through his attorney of record, Jas. W. Arnold, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above cause on August 13th, 1957, and motion for a rehearing denied Sept. 30, 1957.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra page 12, is reported at A. S. 247 Fed. 2d 740.)

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1957, and rehearing denied September 30, 1957, (Appendix B, infra page 19.)

The time for filing a petition for writ of certiorari was extended by Mr. Richard T. Rives, United States Circuit Judge for the Fifth Circuit October 12, 1957, to 90 days after September 30, 1957. (Appendix C, infra page 20.) The jurisdiction of this court is invoked under U. S. C. A. 28 1254 (1), Internal Revenue Code 1954, Sec. 7482. The jurisdiction of the Court of Appeals, Fifth Circuit, was complete in the case here appealed from, (Appendix D, infra page 23.)

QUESTIONS PRESENTED

(a.) Is the amount received by petitioner, a State Trooper of the State of Georgia, as a subsistence allowance in lieu of rations (meals) for the year 1952 included in his gross income as additional compensation within the meaning of Sec. 22 (a) of the Internal Revenue Code of 1939?

OR

(b.) Does the amount of subsistence received by petitioner, a State Trooper of the State of Georgia, as subsistence allowance in lieu of rations (meals) for the year 1952, come within the meaning of the second paragraph of Sec. 39.22 (a)-3 of Regulations 118 (applicable in 1952) which reads as follows: "If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employee."

CONFLICT AMONG COURTS

The writ of certiorari should issue, here, because of the conflict in the case of Robert H. Saunders, petitioner, versus Commissioner of Internal Revenue, Docket no. 11.291, United States Court of Appeals for the Third Circuit, as reported in 215 Fed. 2d 768, with the case of Harold Brannon Magness, Docket no. 16.430, United States Court of Appeals, Fifth Circuit, (The case here appealed from) as reported in the advance sheet of 247 Fed. 2d 740. Saunders being a State Trooper of the State of New Jersey and Magness, likewise, being a State Trooper of the State of Georgia and the issue in both cases being (whether subsistence furnished to each trooper in cash in lieu of rations (meals) should be included in gross income. Thef acts being the same in substance and certainly the law identically the same, this court should hear and determine which of these Circuit Courts rendered the correct decision.

REGULATIONS AND STATUTES INVOLVED

The regulations invloved pertinent to the issue here, is the 2nd Sec. of paragraph one of Sec. 39.22 (a)-3 of Treasury Regulation 118 as follows; "If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employer."

The statute involved; Title 26 Sec. 22, Internal Revenue Code, (1939) "Gross Income."

(a.) General definition—Gross income includes gains, profits and income derived from salaries for personal services *** of whatever kind or in whatever form paid.

GEORGIA STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the applicable statutes and regulations are set forth in Appendix E. infra page 24.

STATEMENT

During the year 1952 and all times here involved, petitioner was a highway patrolman with the Department of Public Safety for Georgia. His station was in the City of Athens, Georgia, a distance of 25 miles from his home near Winder, Georgia. (R 23).

For the year 1952, the Commissioner of Internal Revenue issued a deficiency statement against petitioner for $341.00 assessed against the subsistence furnished petitioner by the State of Georgia for that year. The case was appealed to the Tax Court of the United States which upheld the assessment against petitioner by the Commissioner, holding that the subsistence allowance received by petitioner, a member of the Georgia State Patrol, was *additional compensation* within the meaning of Sec. 22 (a) of the 1939 Code, as reported in 26 T. C. no. 125 (1956).

Petitioner filed a petition to the United States Circuit Court

of Appeals for the Fifth Circuit to review the decision of the Tax Court upholding the determination of the Commissioner of Internal Revenue that a deficiency existed in the income tax liability of petitioner for the year 1952, being case no. 16.430 of that court, in the amount of $341.00. The Court of Appeals, for the Fifth Circuit, on August 13, 1957, affirmed the decision of the Tax Court and adhered to that decision of September 30, 1957, in overruling a motion for a re-hearing therein.

In the decision sustaining the findings of the Tax Court as reported in 26 T. C. 125 (1956), the Court of Appeals, decision reported in full in Appendix A, infra page 12, seemed to base its opinion and conclusion upon the following statement made by the Court as reported in the decision as follows: "The basic question stated very simply is, *were the subsistence payments income? Petitioner addressed himself to this problem as if there was no difference between a situation where an employer furnishes his employee with quarters in kind, meals in kind, or money in lieu of either,*" *and on page four of the decision said that Sec. 119 of the Internal Revenue Code of 1954 applies only to meals or lodging furnished in kind. Therefore, any cash allowance for meals or lodging received by an employee will continue to be included in gross income to the extent that such an allowance constitutes compensation.*"

SOME FACTS

As a member of the State Patrol, petitioner was required to live in a barracks in Athens, Georgia, and was subject to call 24 hours a day, every day of the year, including Sundays (R 25.41, 27, 69). Petitioner received a salary from the State of Georgia for the year 1952 of $2152.50 (R 18) which amount petitioner duly returned for taxes to the collector of Internal Revenue for Georgia and paid the taxes thereon. R 18). In addition to salary, petitioner received as subsistence $1647.00

paid to him in bi-monthly checks upon a basis of $4.50 per day, (R 26 and petitioner's exhibit no. 1). The State of Georgia did not deduct withholding tax from this subsistence (R 27-28). All troopers were allowed a 24 hour pass each week but could not get this pass on a day of the trooper's choice. That was left to the discretion of the Sergeant in chargeo f the station (R 34-42). In addition to a weekly pass, a trooper was allowed 15 days as a yearly vacation. (R 34). At all times whteher on a daily pass or vacation a trooper had to register with his station his whereabouts for every minute of his time, as he was subject to call at all times (R 34.) His vacation was assigned to him by the Director and at his discretion (R 41.) Petitioner stood inspection every morning in the station by the Sergeant and twice a week by the Lieutenant of the division (R 33). Petitioner could not get a daily pass or a day of his vacation between December 15 and January 5. (R 36). Petitioner had to keep his blankets, bed linen laundered, uniforms dry-cleaned and pressed, his belts, pistol scabbards, boots, shoes and brass cleaned at all times ready for inspection, all of this at his own expense. R 36). Petitioner often worked 16 and 18 hours a day (R 44). The Sergeant in command of the station made up a duty roster daily and placed it on the bulletin board which informed petitioner when he came in to the station off of his patrol, where he would patrol the following day (R 42). Petitioner was required to eat his meals on the route assigned to him and at the nearest restaurant to him at meal time, but he must eat on his route and had to radio his station where he was eating when he started to eat and then when he had finished and if he had ordered a meal and before he finished eating it, an emergency arose, he would have to leave his meal uneaten, but had to pay for it. This happened to petitioner many times. (R 30-31-33). Petitioner never spent any of his subsistence for meals while on daily pass or vacation but his subsistence was spent on meals while he was actually on patrol duty (R 41).

CONTROLLING FACTS

The basic facts relating to the original plan of the State of Georgia to furnish meals in kind to the troopers and why it changed to one of furnishing cash in lieu of meals, is shown by the following record.

The Department of Public Safety of Georgia was created by an Act of the Georgia Legislature at the January-February session, 1937, was approved and became a law March 19, 1937 (Act 220, of that session, Acts 1937, pages 322-325).

Robert G. Mayo was its first treasurer and served as such from its formation until February, 1941, (R 58). At first the men were paid a monthly salary and their meals were furnished (R 60). When we organized the patrol, we had to place the men wherever we could find a place for them to sleep (R 64). The state furnished the meals to the troopers in some centrally located place, usually a boarding house (R 64). That was before barracks were built. This system proved to be impossible because of two things. First, the office work proved too voluminous to handle; second, it took the men off the road and left the area unpatrolled while the men came to a centrally located place to eat. The state then changed it to a subsitsence type of pay and paid it bi-monthly, a salary and subsistence (R 64-65-66).

The Court: "Let me see if I understand that last answer? Was it that it was more expensive to the State to do it the way you started than the subsistence?"

The Witness: "Yes, your honor, it was absolutely more expensive." (R 66).

It was then stipulated as follows: "That the minutes of the Board (Board of the Department of Public Safety) during the period covered by the minutes which start in 1937 and cover up to and through the present period, *that there are several entries in the minute book showing increase in subsistence gradually over the years from $3.00 to $5.00 per day* (R 73).

REASONS FOR GRANTING THE WRIT

The basic questions presented in this case are: 1st, the conflict between the decisions in the United States Court of Appeals, Third Circuit, in the case of Robert H. Saunders, a New Jersey State Patrolman, with that of the Harold Brannon Magness case, a Georgia State Patrolman, in the United States Court of Appeals, Fifth Circuit, both cases are in substance based upon the same facts and are controlled by the same law. The Court of Appeals in the Saunders case holding, that subsistence in kind and cash in lieu thereof, was no different in substance and that the subsistence paid to Saunders was not compensation. The Court of Appeals in the Magness case (the case at bar) holding that there was a difference between subsistence in kind and cash in lieu thereof and that any cash allowance for meals or lodging received by an employee will continue to be includable in gross income to the extent that such allowance constitutes compensation. The Court of Appeals in the Magness case invoking Sec. 119 of the Internal Revenue Code of 1954, which was not passed by Congress until two years after the assessment against Magness was made for the year 1952 and did not take effect until December 31, 1953, and was never intended to be given retro spective operation because: unless the contrary intention plainly appears a statute operates prospectively only, as is shown by decisions of the Supreme Court in the following cases: Joseph W. Cox, appellant, v. Ethel Hart, 67 Law Ed. 332 (2) U. S. v. Dixon, 10 Law Ed. 689, Barnitz v. Beverly, 41 Law Ed. 94. The criterion being something done sanctioned by the subsequent act (1954) but was not sanctioned by the former act (1939) when done. Cummings v. Missouri, 4 Wall 277, 18 Law Ed. 356.

Second; In 1925, the Court of Claims held in Clifford Jones v. United States, 60 Ct. of Claims 552, 5 A. F. T. R., 5297, that an army officer was not required to include in his gross income for the year 1923 * * * *cash allowance in lieu of quarters* paid to him during that part of the year when Government quarters were not available upon the premise that the

occupancy of Government quarters by Army officers is a *requisite* to the proper performance of their duties. The United States Government, in that case, contended that the value of the quarters was worth $940.00 and that the $500.00 cash received by Jones in lieu thereof, totaling $1440.00 should be included in his gross income and fixed that amount in his assessment which was paid by Jones, and then brought suit in the Court of Claims for its recovery. The court made an exhaustive analysis of the applicable statute and Army regulations and arrived at four fundamental conclusions pertinent to the cause at bar. Pertinent to this case is Section 4 of those conclusions as follows:

"The Court pointed out that petitioner (Jones) had no choice between accepting quarters in kind or cash in lieu thereof *** in the Court's view, the *money allowance was no different in substance from the original purpose of the allowance in kind.* The Court asked this question, " Could such an allowance be considered income?" and concluded that it could not. In the Jones case the Government relied upon the statutory definition of income contained in Section 213 of the Revenue Act of 1921, which is the same as the present Section 22 of the Code of 1939. Later, the Treasury Department accepted the Jones decision and limited its application to the enlisted personnel and officers of the Army, Navy, Coast Guard, Coast and Geodetic Survey and the Public Health Service, and incorporated it in its rules and regulations (Regs. 77, Art 53; Regs. 86-94, 101, Art 22 (a)-2; Regs. 103, Sec. 19.22 (a)-3; and Regs. 111, Sec. 29-22 (a)-3 now Regs. 118 39.22 (a)-3.)

This question of compensation has been before the Supreme Court many times. In the United States v. Smith, 158, U. S. 346, clearly distinguished between allowances which forms a part of the compensation and those allowances which serve to to reimburse expenditures made. In its conclusions the Court said:

"Pay is a fixed and direct amount given by law to persons

in the military service in consideration of any and as compensation for their personal service. Allowances as they are called or emolutants as they were formerly termed, are indirect or contingent remuneration which may or may not be earned and which is sometimes in the nature of compensation and sometimes in the nature of reimbursement."

In United States v. Mills, 197, U. S. 223-227, the Supreme Court had before it the question of computation of longevity, pay due an officer of the army. In the discussion, the following language was used:

"The words *pay proper* we see no reason to think or to be construed differently from the word *pay*. The term means compensation, which may properly be described or designated as pay, as distinguished from allowances, computation for rations or other methods for compensation not specifically described as pay."

In the Jones case, supra, the Court of Claims in the body of the decision said: "In our view of the case what was said in the Mills case is a clear exposition of the fundamental distinction between *pay* and *allowance*. Therein, it is pointed out in the line of demarcation between pay, allowances and other methods of compensation, the court improvised by specification and generalization what Congress intended by use *pay proper*.

Federal District and Circuit Judges receive an allowance, not to exceed $10.00 a day when absent holding court away from their homesfl Allowances of this character are clearly intended as reimbursement and form no part of the Judge's compensation.

Smith v. Jackson, 241, Fed. 747. 246 U. S. 388. Congress actually appropriates certain sums for the Executive Department and likewise a travel allowance. Such appropriations have not been and are not charged against the President as compensation. Members of Congress receive certain allowances. This court determined with reference to indication that the allowances were not part of their compensation. Wilson v. U. S., Court of Claims 428. A vast number of government employees re-

ceived travel expenses and fixed sums in lieu of subsistence when away on government affairs. Clearly, such allowances are for purposes of reimbursement.

In the case of Gould v. Gould 245 U. S. 151, the Supreme Court said: "In the interpretation of statute, levying taxes it is the established rule not to extend their provisions by implications beyond the clear import of the language used or to enlarge the operation."

The Jones case, supra, is reported in full on page 5297 in Amended Federal Tax Report, volume 5.

It is apparent by the Legislature of Georgia from the points made in creating and setting up the Department of Public Safety, of which the State Patrol is an integral part, that specific provisions there are made regarding the distinction between pay and compensation to be paid to the State Troopers and the allowances such as quarters, rations, and cash disbursements in lieu thereof, are not part of their compensation. It is made clear by the record herein that the State of Georgia, first intended to erect barracks, set up kitchens in which to feed the troopers and house them. It was found early in the procedure of these effects that to feed the men in a centrally located place would take the troopers off the patrol during the time of eating their meals and leaving the area unpatrolled. The State of Georgia, employer herein, saw that by this method it could not render to the public the services that the public lic required and thereby made a change to one requiring the troopers tol ive in the barracks but to eat their meals on the patrol route, thereby keeping the troopers at all times on the patrol and furnishing them cash for their meals. We contend that the cash so furnished was no different from a reimbursement for the meals and was done for the convenience of the State of Georgia in order that the trooper could better perform his duties. The change was a matter of necessity so that the state could render its greatest service to the public.

The Tax Court of the United tSates, in the Gunnar Van Rosen case as reported in 17 T. C. 834 (1951) held, that the

principle in the Jones case should be limited to the military personnel, and has held steadfastly to that principle in every case since, including the Saunders case, supra, and the Magness case at bar. Van Rosen was a civilian employee of the Army Transportation Corps and worked under a negotiated contract that included salary and allowance.

This Court should hear and determine whether or not, (a) the Treasury Department can limit the effect of a case that has been judicially determined, by including its own interpretation in a regulation. (b) This Court should hear and determine whether or not the Tax Court can place its own interpretation upon a case judicially determined, and thereby limit its effect, and by so doing, convert it into a law of a class, such as the Jones case, supra. by determining, that the principle of the Jones case should not be extended further than to the military personnel, (Van Rosen case, supra.)

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX "A"

In the United States Court of Appeals, for the Fifth Circuit

No. 16430

Harold Brannon Magness, Petitioner

versus

Commissioner of Internal Revenue, Respondent.

Petition for Review of Decision of The Tax Court of the United States (District of Georgia)

(August 13, 1957.)

Before RIVES and CAMERON, Circuit Judges, and DAWKINS, Sr., District Judge.

RIVES, Circuit Judge: This petition for review of a Tax Court decision[1] concerns the taxability of subsistence money received in lieu of meals during the year 1952 by a Georgia Highway Patrolman. His salary that year amounted to $2,152.50, whileh is subsistence payments came to $1,647.00.

The uniformed division of the Georgia Highway Patrol was organized on a military pattern by its first Director, Captain Carter, a former Captain of Cavalry in the United States Army. It has followed the same general pattern until the present time. When the Patrol was first organized, its members were paid $100.00 a month and their meals and lodging were furnished.

The Department of Public Safety soon found that it was financially costly, administratively impossible, and inefficient to continue feeding the men at some central place or at boarding houses. The present arrangement requires the members of the Highway Patrol to live in the barracks at their particular post.

In this case, Trooper Magness was a member of Troop "D"

1 Reported at 26 T.C. NO. 125 (1956).

of Post 32 at Athens, Georgia. He was subject to call twenty-four hours per day, every day of the year; it was necessary that his headquarters be advised of his whereabouts at all times, whether on duty or off duty; and the subsistence payments at the rate of $4.50 per day were paid to him for 366 days during 1952. Magness testified that on his off days and vacation days[2] he ate with his mothero n the family farm, otherwise, he ate at any public restaurant of his choice, except when actually on patrol. When on patrol, it was necessary that he eat at some restaurant on his route and that he report previous to doing so to his headquarters, telling them how he could be reached. He also testified that he was required to keep his headquarters constantly informed of how he could be contacted in case he was needed, but that he was never called during 1052 while on vacation or while on days off. He further testified that $4.50 per day was not enough to pay for his meals; that his bed linens, blankets and uniforms were furnished by the State, but that he had to furnish his own underwear and keep his other gear cleaned and shined

The basic question stated very simply, is "Were the subsistence payments income?" Petitioner addresses himself to this problem as there were nod ifference between situations where an employer furnishes his employee with quarters in kind, makes in kind or money in lieu of either.

The Regulations and administrative rulings from 1919 to the present tiine have excluded from income the value of meals furnished in kind for the convenience of the employer, probably upon the theory thatt hey should not be considered as compensation to the employee. Section 39.22(a)-3 of Treasury Regulations 118, promulgated under the internal Revenue Code of 1939, provides in part:

> " * * * If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income

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2 15 days vacation plus 46 days off.

> subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees."[3]

The Senate Committee, in studying Section 119 of the 1954 Code,[4] stated:

> "Section 119 applies only to meals or lodging furnishin kind. Therefore any cash allowances for meals or lodging received by an employee will continue to be includable in gross income to the extent that such allowances constitute compensation."[5]

The consistent difference in treatment administratively and by the Congress between meals furnished in kind for the convenience of the employer and money in lieu thereof in no way binds the courts, but it is entitled to their serious consideration.

The Constitution[6] gives the Congress the power to lay and collect taxes on incomes "from whatever source derived," words

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3 See also, T.D. 4965, 1940-1 Cum. Bull. 13; Sections 1.119-1 Fed. Tax Regulations, 1957; compare Section 1.120-1, Id.

4 "§119. *Meals or lodging furnished for the convenience of the employer*

"There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his imployer for the convenience of the employer, but only if—

"(1) in the mase of meals, the meals are furnished on the business premises of the employer, or

"(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.

"In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation." 26 U.S.C.A. §119.

5 Senate Report No. 1622, 83rd Cong., 2d Sess., pp. 19-20, 190-191; 3 U.S.C. Congresisonal and Administrative News (1954) 4621, 4649, 4825-4826

6 Sixteenth amendment

of enlargement indicating an intention that the meaning of "income" should be restricted.[7] Section 22(a) of the Internal Revenue Code of 1939 defines "gross income" to include, inter alia, "gains, profits, and income derived from salaries, warges, or compensation for personal service * * * of whatever kind and in whatever form paid * * *." This definition "is broad enough to include in taxable income any economic or financial benefit conferred on the employee as compensation, whatever the form or mode by which it is effected." *Commissioner v. Smith*, 324 U.S. 177, 181 (1945). Subsection (b) of Section 22 lists those items which shall not be included as a part of income. Sixteen items are listed and they do not include money provided to state employees with which to buy meals. In Section 22 (b) (13), an exclusion is listed which applies expressly to enlisted personnel and commissioned officers of the Armed Forces of the United States, but not until the Internal Revenue Code of 1954, by Section 120[8] thereof, was subsistence money of state highway patrolmen excluded from income. The House Committee Report and the Senate

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7 See Eisner v. Macomber, 252 U.S. 189, 207 (1920); 1 Mertens, Federal Income Taxation, §§5.01, 503; Magill, "Taxable Income", p. 67.

8 "§120. *Statutory subsistence allowance received by police*

"(a) *General rule.*—Gross income does not include any amount received as a statutory subsistence allowance by an individual who is employed as a police official by a State, a Territory, or a possession of the United States, by any political subdivision of any of the foregoing, or by the District of Columbia.

(b) *Limitations.*—

"(1) Amounts to which subsection (a) applies shall not exceed $5 per day.

"(2) If any individual receives a subsistence allowance to which subsection (a) applies, no deduction shall be allowed under any other provision of this chapter for expenses in respect of which he has received such allowance, except to the extent that such expenses exceed the amount excludable under subsection (a) and the excess is otherwise allowable as a deduction under this chapter." 26 U.S.C.A. §120.

Committee Report on this section were practically identical and stated that it was new legislation.[9]

Thus, we have the Congress, for the first time, making subsistence payments to state police officers excludable from income, but not effective until after December 31, 1953. Furthermore, as has been stated, there are no administrative rulings by the executive branch which would exclude such payments from income, and in the judicial branch only the Third Circuit in *Saunders v. Commissioner of Internal Revenue*, 215 F. 2d 768 (1954), and the Court of Claims in *Jones v. Unted States*, 60 Ct.Cl. 552 (1925), which will be discussed later, have ruled that such money might be excluded from income. On the other hand, the Commissioner and the Tax Court have held that such payments are income and taxable.[10]

This case is probably distinguishable from *Saunders v. Commissioner of Internal Revenue*, *supra*, inasmuch as (a) There it was conclusive that the $70.00 a month received by Saunders in lieu of rations was not intended as compensation, and, in fact, the Tax Court found that the rations allowance "was not regarded or accounted for as compensation, either in the State Police Budget or by the State Civil Service Commission." Here the Tax Court failed to find that the "subsistence payment" was intended as a reimbursement. In fact, the provision of the Georgia law providing for a subsistence allowance

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9 See Senate Committee Report on Internal Revenue Code of 1954, Part I, Sec. VII, K; U.S.C. Congressional and Administrative News 4621, 4649:

"K. *Subsistence Payments to State Police Officers* (sec. 120)

"(1) House changes accepted by committee.

"The House and your committee's bill provide an exclusion from gross income not to exceed $5 a day, for subsistence allowances paid to officers of a police department of a State, Territory, the District of Columbia, or a possession. *There is no comparable existing law.* It is believed that this exclusion is desirable because State police officers are required to make frequent trips away from their posts of duty. Under present law these expenses cannot be deducted if the police officer is to use the standard deduction." (Emphasis added.)

10 See Hyslope v. Commissioner, 21 T.C. 131; Saunders v. Commissioner, 21 T.C. 630; and this case, Magness v. Commissioner, 26 T.C. 982.

is found in Section 92-A-209 of 27 Code of Georgia Annotated, entitled "Same, Personnel, Officers' *Salaries*" (Emphasis is supplied), and not in Section 92-A-237 entitled "Allowance for Board and Quarters." (b) Saunders received $70.00 per month to pay for meals while actually on patrol, and he was required to eat at a place on his route at a particular time. Magness, on the other hand, received $4.50 per day every day of the year, even while on vacation or on days off, and, except for the time when he was actually on patrol, could eat at any place he chosefl When he was on patrolthe only requirement was that he notify his headquarters where he could be reached while he was eating. He testified that, while he was off duty, he could do anything he wanted to provided he notified his headquarters that they could get in touch with him in case of an emergency.

The *Jones* case, *supra*, heavily relied on by the Third Circuit in *Saunders*, *supra*, and by petitioner here was distinguished in *Robert H. Saunders*, 21 T.C. 630 (1954);*Charles H. Hyslope* 21 T.C. 131; and *Gunnar Van Rosen*, 17 T.C. 834, 839-840 (1951), as follows:

> "While the *Jones* case is authority for the xeclusion from gross income by military personnel of cash allowances made to them for subsistence and quarters, it does not, in our opinion, require or justify an extension of the rule therein to similar allowances made to civilian personnel."

Further, the *Jones* case presented the peculiar situation wherein the United States, with one hand, as an employer, gives money to its employees, and with the other hand, as a tax collector, takes it back; whereas, a state is in the same position as any other employer so far as federal income tax obgligations of its employees are concerned.

Moreover, while we accord great weight to the holding of the Third Circuit, we differ from it as to the meaning and application of Section 39.22 (a)-3 of Treasury Regulation

118. *Saunders* admitted that the payment of cash to an employee is mainly compensatory and probably more obviously so that a payment in kind. Nevertheless, it was stated,

> "In the instant case, cash was furnished Saunders in advance for a particular purpose, viz., payment for meals, and it is an established fact that the entire amount furnished was so expended but it does not automatically follow that the cash received was compensation."

Saunders v .Commissioner of Internal Revenue, *supra*, at pp. 771-772. By finding some special cases in which cash thus received was held by the Treasury Department not to be compensation,[11] and relying heavily on *Jones v. United States*, 60 Ct.Cl. 552 (1925), it was able to apply the administrative ruling to situations in which money was furnished. Magness now asks us to extend that application to situations in which money is furnished to buy meals indiscriminately while on duty and while off duty and on vacation.

Under familiar and often recognized rules of construction,[12] we conclude that we should not do so but should, on this occasion, agree with the reasoning of the Tax Court. Its decision is therefore

AFFIRMED

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11 O.D. 11, 1 Cum.Bull. 66 (1919). American Red Cross employee receiving cash for maintenance but no pay. Only amount actually unused for expenses need be returned. O.S. 514, 2 Cum.Bull. 90 (1920). Supper money furnished an employee after regular working hours.

12 Commissioner v. LoBue, 351 U.S. 243, 246 (1956); Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); Commissioner v. Jacobson, 336 U.S. 28, 48-49 (1949); Commissioner v. Smith, 324 U.S. 177, 181 (1945); Helvering v. Clifford, 309 U.S. 331, 334 (1940); White v. United States, 305 U.S. 281, 292 (1938); Helvering v. Midland Mutual Life Ins. Co., 300 U.S. 216, 223 (1937); Douglas v. Willcuts, 296 U.S. 1, 9 (1935); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934); Irwin v. Gavit, 268 U.S. 161, 166 (1925); Yazoo & Mississippi Valley R. Co. v. Campbell, 181 F. 2d 451, 457 (7th Cir. 1950).

APPENDIX "B"

Harold Brannon Magness, versus Commissioner of Interal Revenue, No. 16.430, U. S. Court of Appeals, Fifth Circuit.

This cause came on to be heard on the petition of Harold Brannon Magness, for review of the decision of the Tax Court of the United States, and was argued by counsel; On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this case be, and the same is hereby affirmed.

Extract from the minutes of the Judgment, of August 13th, 1957.

Order denying rehearing. Extract from the minutes of September 30th, 1957.

Harold Brannon Magness vs. Commissioner of Internal Revenue, No. 16.420, United States Court of Appeals, Fifth Circuit.

"It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied."

APPENDIX "C"

MOTION FOR STAY OF MANDATE

Filed October 11, 1957 in the United States Court of Appeals, Fifth Circuit. Harold Brannon Magness, Appellant, versus Commissioner of Internal Revenue, Appellee. Case No. 16-430.

Now comes Harold Brannon Magness, appellant herein, by and through his attorney of record, Jas. W. Arnold, and within the time prescribed by law, and being dissatisfied with the decision rendered against him in the foregoing case by this Hon. Court desires to make application for certiorari, in order that said case may be heard in the Supreme Court of the United States: and due to the constant attendance of said Jas. W. Arnold upon the State Courts of Georgia, beginning Monday, October 14th, 1957, and continuously thereafter through November, 1957, and then upon the United District Court which convenes in Athens, Georgia, December 2nd, 1957, and until said court is adjourned; prays from this Hon. Court, an order, extending the time by which said attorney may perfect and prepare the said application for certiorari to ninety days or to January 1st, 1958, and that the mandate herein may be stayed until such time as the Courts may hear and dtermine said certiorari.

Respectfully submitted,
/s/ JAS. W. ARNOLD
James W. Arnold, Attorney of
Record Herein.

ORDER STAYING MANDATED

Filed October 14, 1957, in the United States Court of Appeals for the Fifth Circuit.

Harold Brannon Magness, Appellant, versus Commissioner of Internal Revenue, Appellee. No. 16,430.

IN CONSIDERATION OF THE APPLICATION of the

petitioner in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable him to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of ninety days from September 30, 1957; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within ninety days from September 30, 1957 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of ninety days from September 30, 1957, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 12th day of October, 1917.

/s/ RICHARD T. RIVES
United States Circuit Judge

CLERK'S CERTIFICATE
UNITED STATES OF AMERICA
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

I, EDWARD W. WADSWORTH, Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 98 to 124, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 16430, wherein Harold Brannon Magness, is petitioner, and Commissioner of Internal Revenue, is respondent, as full, true, complete as the original of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 97 are identical with the printed record upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto, subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of October, A. D., 1957.

EDWARD W. WADSWORTH
Clerk of the United States Court of Appeals
for the Fifth Circuit
By Gilbert F. Gamcheau, Deputy Clerk

APPENDIX "D"

The jurisdiction of the Supreme Court of the United States is invoked here under 28 U.S.C. 1254 (1), Internal Revenue Code 1954, Sec; 7482, and under U.S.C.A., Title 26 Sec. 1141 (a), "The Circuit Court of Appeals, and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat 938, (U.S.C. Title 28 Sec 346); And the judgment of any such Court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat 938 (U.S.C. Title 28, Sec. 347).

The United States Court of Appeals, Fifth Circuit had jurisdiction to hear and determine on review the decision of the Tax Court of the United States in Case Docket #55503, pursuant to U.S.C.A. Title 26 Section 1141 (b) of the Internal Revenue Code 1939, because, petitioner having made and filed his income tax returns for the taxable year (1952) involved, in the office of the Collector of Internal Revenue for Georgia, Athens, Georgia.

APPENDIX "E"

GEORGIA STATUTES AND REGULATIONS INVOLVED:

The Department of Public Safety of Georgia was created by an Act of the Georgia Legislature at the January-February Session, 1937, was approved and became a law March 19, 1937, being Act No. 220 of that session. Acts 1937 pages 322-355.

In the preamble of the Act it is stated as follows: Acts 1937, page 322. "To create a Uniform Division known as the Georgia State Patrol; To provide rules and regulations for the operation and control of the Uniform Division known as the Georgia State Patrol; To fix the ages of enlistment, re-enlistment, and retirement of members of the Uniform Division; To provide for recruiting, training, promotion, and discharge of the members of the Uniform Division; To provide punishment for withdrawal by a member without consent; To provide for furnishing quarters, offices, supplies and equipment; To provide for Headquarters Staff, and for each District or Division thereof; To provide for furnishing QUARTERS, MEALS AND LODGING FOR THE MEMBERS OF THE UNIFORM DIVISION; To provide for the creation of Districts or Divisions, Headquarters, etc."

Section 3 of Article 1 of that Act provided; The Department of Public Safety as herein created shall appoint a person to be known as the Commissioner of Public Safety in Georgia, who shall be the highest ranking officer in the Uniform Division of the Georgia State Patrol, and who shall under the direction of the Department of Public Safety, exercise supervision and control over all the Divisions and employees of the Department of Public Safety. Prescribing his salary, term of office, qualifications, duties, method of removal, etc., and providing for a deputy commissioner. Acts 1937, pages 325-326.

In 1934, Acts 1943, pages 196-201, the foregoing Act was amended by changing the name of Commissioner of Public

Safety and Deputy Commissioner of Public Safety to Director of Public Safety and Deputy Director of Public Safety.

Section 5 of Article 2 of that Act provided: That it would be a misdemeanor for any officer or trooper to withdraw from service in the Uniform Division, without written application approved by the Director of the Department of Public Safety. Acts 1937 page 333.

Sec. 11, Article 2 of that Act provided; That the Director is authorized, with the approval of the Department of Public Safety; To provide for comfortable barracks for the officers and troopers of the Uniform Division of the Department of Public Safety at such Districts or Divisions, etc.; To provide for SERVING MEALS at such barracks, and for the upkeep and maintenance of same. Acts 1937 pages 322-335. And until adequate barracks with proper facilities for furnishing MEALS are secured, all officers and troopers shall be given a proper allowance for MEALS as lodging. Acts 1937, pages 322-336.

Under the Act of 1943 (Amendment) it was provided; That all members of the Uniform Division of the Department of Public Safety shall be paid a subsistence allowance of not less than $2.50 per diem. Acts 1943 pages 196-201.

In 1951 the Georgia Legislature amended the Act of 1937, and all ammendatory Acts thereto as follows: 1. By increasing the salaries of all enlisted men of the Uniform Division; 2. By increasing the allowance of subsistence to officers and troopers alike to not less than $4.00 per day and not more than $5.00 per day, providing; "That said subsistence is hereby made mandatory in the sum of not less than $4.00 per day and not more than $5.00 per day; and shall be in addition to all salaries and/or compensation." Acts 1951, page 636, approved and became the law February 21, 1951.